Supreme Court, U.S.
FILED
SEP 17 2001
CLERK

No. 01-276

IN THE

# Supreme Court of the United States

EZZO'S INVESTMENTS, INC.,

*Petitioner,*

*v.*

ROYAL BEAUTY SUPPLY, INC., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT MATRIX ESSENTIALS, INC.

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## QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly conclude that a manufacturer's vertical non-price restraint is to be analyzed under the rule of reason?

2. Did the Sixth Circuit correctly determine that the defendant-manufacturer was entitled to summary judgment on plaintiff's *per se* claim because plaintiff's claim involved only a vertical non-price restraint that is not a *per se* violation but rather is subject to analysis under the rule of reason?

3. Did the Sixth Circuit correctly conclude that the defendant was entitled to judgment as a matter of law at trial because the plaintiff failed to offer any evidence of causation of damages, any evidence of fact of damages, or any reasonable basis upon which computation of damages could be made?

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Matrix Essentials, Inc., is a wholly owned subsidiary of L'Oreal S.A., which is publicly traded.

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional provision is involved. This is an antitrust case involving a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal.

15 U.S.C. § 1.

## REASONS FOR DENYING THE WRIT

### I.

### THERE IS NO COMPELLING REASON FOR THIS COURT TO REVIEW THIS CASE: PETITIONER MERELY DISLIKES THE OUTCOME OF THE LOWER COURTS' CORRECT APPLICATION OF LONG-STANDING ANTITRUST LAW TO A VERTICAL NON-PRICE RESTRAINT.

Petitioner has presented no compelling reason for this Court to grant a writ of certiorari in this case. Rule 10 of the Rules of the Supreme Court of the United States states:

A petition for a writ of certiorari will be granted **only** for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

U.S. Sup. Ct. R. 10 (emphasis added). None of the above, or any other, compelling reasons are present in this case where

the lower courts merely correctly applied long-standing legal precedents to the facts and evidence. *See Rice v. Sioux City Memorial Cemetery, Inc.*, 349 U.S. 70, syl. (1955) (pursuant to predecessor to R. 10, writ of certiorari was improvidently granted because case did not involve "special and important reasons," which are not present when review is only for benefit of particular litigants and not to public at-large).

As set forth by Petitioner in his Petition, this case involves a portion of respondent Matrix Essentials, Inc.'s ("Matrix")[1] Professional Salon Policy, known as the "50% Rule." The 50% Rule provides that:

> Matrix retail products are sold to professional salons with the sole intent that the salons resell such products only to their clients. These retail sales are based upon the professionals' knowledge of their clients' hair and beauty needs, as well as an appreciation of each client's particular skin condition and requirements. It is understood that a professional salon is a salon whose greater percentage of gross sales comes from cosmetology services, not the sale of products.

(R. 37, Apx. to Matrix's Memo. in Support of Summary judgment, Ex. 4, Ex. A, 6th Cir. Apx. p. 289.) In other words, the 50% Rule provides that Matrix products will only be supplied to salons that derive more than 50% of their gross sales from cosmetology services and less than 50% of their gross sales from the resale of products.[2]

1. Matrix is a manufacturer of professional beauty products. (R. 126, Matrix's Partial Summary Judgment Motion, pp. 1-2, 6th Cir. Apx. pp. 791-792.)

2. Matrix's Professional Salon Policy (including the 50% Rule) furthers an important principle on which Matrix was founded: that (Cont'd)

There is no dispute that Matrix's 50% Rule is a vertical restraint because it involves limitations on sales between a manufacturer and its customers. (R. 153, Memorandum, p. 5, 6th Cir. Apx. p. 39.) In addition, as the lower courts correctly found, the 50% Rule, on its face, does not in any way involve agreements on price or price levels. *See Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 985, 986 (6th Cir. 2001) (reproduced in Petitioner's Appendix at pp. 9a, 10a). Thus, on its face, the 50% Rule is a vertical non-price restraint.

As a leading antitrust scholar explained, vertical non-price restraints are those that "most typically concern market divisions, such as customer or territorial restrictions. For example, a manufacturer may place limitations on the territories within which its distributors may sell **or on the customers to whom they may sell** or both in a variety of ways." Von Kalinowski, *Antitrust Laws and Trade Regulations*, 2 ed., § 18.01 (1988) (emphasis added). This is precisely what Matrix's Professional Salon Policy, including the 50% Rule, does. The Policy limits those customers to whom Matrix products may be sold to (1) those that are salons and (2) those salons that derive a greater percentage of their revenue from services than from the sale of retail products.

The law is well settled that vertical non-price restraints, such as Matrix's Professional Salon Policy, including the 50%

(Cont'd)

Matrix products be sold only in salons. The Policy is intended to maintain the integrity of Matrix's product line by making it more likely that Matrix products will go hand-in-hand with cosmetology services, i.e., with a recommendation by a professional stylist based upon each individual client's needs. (R. 127, Graham Aff. ¶ 3, 6th Cir. Apx. pp. 854-55.)

Rule, are to be examined using a rule of reason analysis. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977); *International Logistics Group v. Chrysler Corp.*, 884 F.2d 904, 906-07 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1783 (1990); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984). A rule of reason analysis requires a plaintiff to prove that the vertical non-price restraint at issue adversely affects interbrand competition. *See Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 810 (6th Cir. 1988). This proof typically includes a showing that the defendant has the requisite market power to adversely affect interbrand competition. *See Lie v. St. Joseph Hosp. of Mount Clemens*, 964 F.2d 567, 569 (6th Cir. 1992).

Solely in order to avoid the rigorous proof required by the rule of reason analysis (which Petitioner was unable to meet), Petitioner attempts to argue that Matrix's 50% Rule is actually a "cleverly designed output/price restriction which masquerade[s] as [a] vertical nonprice limitation." Petition, p. 6. Specifically, Petitioner argues that Matrix's 50% Rule "restricts the quantity of products a salon may sell if that salon desires to continue stocking the industry's most popular brand."[3] However, Matrix's 50% Rule does no such thing.

As the Sixth Circuit found:

> [Petitioner's] argument characterizes the 50% rule as a limit on sales, but the policy is neutral. Any

3. While Matrix would like to believe that it is in fact "the industry's most popular brand," as Petitioner states, there is no evidence in the record that this statement is true.

> salon that has the ability to purchase Matrix products through conformity with the 50% rule may increase or decrease sales or service volume by making either increases or decreases in volume of sales or services or increases or decreases in the price of sales or services and conform to the rule. [Petitioner] makes conclusory statements about the negative effect of the 50% rule on interbrand competition or its hidden design to fix prices at the suggested retail level, but it presents no evidence which could support a finding consistent with these claims.

*Ezzo's Investments*, 243 F.3d at 987 (reproduced in Petitioner's Appendix at pp. 12a-13a). Indeed, as the Sixth Circuit points out, there are numerous ways a salon, such as Petitioner, can maintain compliance with the 50% Rule without reducing its sales output: a salon could provide more services, raise the prices of its services, add stylists, or even reduce the price of the retail products it sells.

In short, there simply is no basis upon which Matrix's 50% Rule can be found to be an output or price restriction masquerading as a non-price restriction. Thus, there is no basis for Petitioner's contention that the Sixth Circuit's decision in this case "invites" output/price restrictions "masquerading" as non-price restrictions or that the lower courts should have treated the 50% Rule as a *per se* vertical price restraint. Accordingly, there is no compelling reason for the Court to grant a writ of certiorari based on this argument of Petitioner's.

## II.

## NO "GUIDANCE" IS NEEDED FROM THIS COURT AS TO THE PROPER ANALYSIS TO BE USED IN CASES INVOLVING OUTPUT/PRICE RESTRAINTS BECAUSE THIS CASE DOES NOT INVOLVE ANY OUTPUT/PRICE RESTRAINT.

There is no reason for the Court to use this case to give "guidance" regarding output/price restrictions. As set forth above, this case does not involve an output/price restriction. It involves a vertical non-price restraint that helps ensure Matrix's products are sold in salons where it is more likely than not that the products will go hand-in-hand with a recommendation by a professional stylist based upon each individual client's needs. (R. 127, Graham Aff. ¶ 3, 6th Cir. Apx. pp. 854-55.)

Even if this case did involve an output/price restriction, there still would be no reason for this Court to grant Petitioner's request for a writ of certiorari based upon this argument. The law regarding output/price restrictions is clear, so no "guidance" is needed by this Court and, even if "guidance" in this area would be helpful, the opportunity for helpful guidance does not present a "compelling reason," as required by Rule 10, for this Court to grant a writ of certiorari.

## III.

## THIS COURT NEED NOT REVIEW HERE ANY "POTENTIAL DETERRENT EFFECT" OF A REQUIREMENT THAT AN ANTITRUST PLAINTIFF PROVE THE AMOUNT OF DAMAGES WITH PRECISION BECAUSE PETITIONER WAS NOT REQUIRED TO PROVE THE AMOUNT OF ITS DAMAGES WITH PRECISION; IT WAS MERELY REQUIRED TO PROVE CAUSATION, THE FACT OF DAMAGE, AND SOME REASONABLE MEASURE FOR COMPUTING DAMAGES, NONE OF WHICH IT DID.

Petitioner suggests in its Petition that this Court should grant a writ of certiorari here because the lower courts misapplied the law of damages in this case. *See* Petition p. 12 ("The precision of proof required by the District and Court of Appeals flies in the face of a long line of decisions by this Court recognizing that an antitrust plaintiff is rarely able to prove its damages with mathematical precision.") However, this alleged misapplication of the law does not present a "compelling reason" that would warrant the granting of Petitioner's Petition. *See* U.S. Sup. Ct. R. 10.

Moreover, Petitioner is simply incorrect that the lower courts required Petitioner to prove its damages with mathematical precision. The lower courts merely required Petitioner, consistent with settled law, to prove causation, prove that there was in fact damage, and provide some method, beyond mere speculation, of determining what damages, in any, resulted from Matrix's actions. *Ezzo's Investments*, 243 F.3d at 990-91 (reproduced in Petitioner's Appendix at pp. 19a-24a).

The law is clear that an antitrust plaintiff must show a causal link between the alleged violation and the plaintiff's claimed damages. *See Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981). At trial, Petitioner failed to show this causal link and further failed to provide any way for the jury to separate any alleged damages resulting from Matrix's conduct from any damages resulting from other factors. *See Ezzo's Investments*, 243 F.3d at 990-91 (reproduced in Petitioner's Appendix at pp. 20a-22a).

Petitioner's own expert admitted that many factors and actual occurrences, other than anticompetitive activity by Matrix, could have caused any economic loss Petitioner suffered after it lost the Matrix line of products. (Tr. Vol. 3 (Ebeido) 55-60, 66, 6th Cir. Apx. pp. 1492-93; Tr. Vol. 4 (Pugh) 57, 6th Cir. Apx. p. 1615.) However, Petitioner's expert failed to consider these other factors when attempting to determine Petitioner's damages. (Tr. Vol. 4 (Pugh) 57, 6th Cir. Apx. p. 1615.) This fact alone warranted the lower courts' findings that there was no causation and that the jury had no method beyond speculation for determining what damages, if any, were attributable to Matrix's conduct as opposed to unrelated factors. *See Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993) ("When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage."); *Isakson v. Vermont Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988) (plaintiff failed to establish causal link or amount of damages when ignored other unrelated causal factors that were at work).

Furthermore, Petitioner was unable to prove the fact of damage with any reasonable certainty. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (an antitrust plaintiff must prove fact of damages with reasonable certainty). In order to establish the fact of injury resulting from the exclusion of a certain source of supply, a plaintiff must show that there is a lack of comparable alternative substitutes for the excluded supply. *Elder-Beerman Stores Corp. v. Federated Dep't Stores Inc.*, 459 F.2d 138, 148 (6th Cir. 1972); *Beach v. Viking Sewing Mach. Co.*, 784 F.2d 746 (6th Cir. 1986).

There was not a scintilla of evidence in the record at trial that Petitioner suffered from a lack of comparable alternative substitutes for the Matrix product line that it lost. To the contrary, the undisputed evidence showed that at the time of trial, Petitioner carried at least twenty-five additional product lines, some of which could be characterized as better than Matrix products. (Tr Vol. 4 (Pugh) 159-162, 6th Cir. Apx. pp. 1650-53.) Additionally, Petitioner's gross sales continued to increase substantially after it lost the Matrix line, which also contributed to the conclusion that Petitioner did not show the fact of any damages. (Tr. Vol. 4 (Pugh) 20, 6th Cir. Apx. p. 1611.)

As is evident from all of the above, the lower courts did not require Petitioner to prove its damages to a mathematical certainty; they merely required it, consistent with established law, to show causation, the fact of damages, and some reasonable method for calculating those damages, beyond sheer speculation. Petitioner was unable to do so, but that is no reason for this Court to grant a writ of certiorari in this case.

## CONCLUSION

This case presents absolutely no compelling reason for this Court to grant a writ of certiorari. This case involves only settled law (regarding vertical non-price restrictions, the rule of reason, and antitrust damages) that was correctly applied by the Sixth Circuit. Petitioner is merely unhappy with the outcome because it is not favorable to Petitioner; that is not a sufficient reason for this Court to grant a writ of certiorari. Accordingly, for all of the foregoing reasons, Respondent respectfully requests that the Court deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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